who made the decision to deny Mrs. Titelman's motion for a directed verdict. Similarly, with reference to subpart B, Mrs. Titelman has not alleged any fact that if it had been presented to the district attorney, police, or grand jury, would have misled Judge Flournoy. Although Mrs. Titelman alleges with no specificity that Defendants Woods and Titelman provided incomplete information to the criminal jury, Mrs. Titelman undertook a significant effort to rebut the state's case and presented several witnesses, including the forensic psychologist who evaluated the children in Mississippi, in support of her contentions against Mr. Titelman and her defense of justification. Despite her presentation of this evidence, Judge Flounoy again denied her renewed motion for directed verdict. At the time he made that ruling, the Judge had before him all of the information in the possession of the parties. Mrs. Titelman's allegation that Defendants Woods and Titelman "encouraged" other witnesses to provide "incomplete information" does not show that other witnesses did so, nor does it show that Judge Flournoy's

rulings were procured by fraud. Similarly, an accusation that Defendants "pressured" the District Attorney into bringing charges or "continued" to participate in the prosecution by "assisting" the District Attorney, does not have any effect on the rulings of Judge Flournoy. *See* Amended Cmplt., ¶¶ 15D, E and F. As the court explained in its previous order, the involvement of the FBI or the U.S. Attorney's Office is immaterial to the instant malicious prosecution suit based on a state court criminal trial. *See id.*, ¶ 15G. Mrs. Titelman's remaining allegations, again, would not have any effect on the decision of Judge Flournoy to deny her motions for a directed verdict. *See id.*, ¶¶ 15H-K.

Mrs. Titelman filed suit against Andrew Charles Titelman, her ex-husband; Craig Chandler, a detective with the Kennesaw Police Department; John Mayoue and Pamela Gray, attorneys for Andrew Charles Titelman; and Diane Woods, a guardian ad litem appointed to represent the Titelman children during the divorce proceedings between the Titlemans. Yet Mrs. Titelman's complaint

is devoid of any allegation of any specific act taken by her ex-husband, the lawyers, and a police officer that could possibly have affected Judge Flournoy's decision given the complete factual record and full presentation he had of Mrs. Titelman's defense.

Judge Flournoy's ruling on probable cause was conclusively established. The only basis upon which Mrs. Titelman's suit could proceed, as the court explained to her counsel, was by showing that Judge Flournoy's ruling was procured through fraud or corruption. There is no allegation that any plotting or scheming done by Defendants had anything to do with the decision of the Judge. The court recognizes that Mrs. Titelman raised arguments with respect to the charging decision of the District Attorney's Office. As evidenced by the criminal trial transcript, however, Judge Flournoy was fully aware of the parties' competing contentions on this issue and accepted the state's argument that the taking could be accomplished by not returning to Georgia. The court has no occasion to substitute its judgment for that of a state court trial judge. In sum, Plaintiff

failed to allege with any particularity the acts by Defendants that support her complaint of malicious prosecution despite being given an opportunity by the court to reform her complaint. Plaintiff also failed to allege that Judge Flournoy's denials of her motions for a directed verdict were procured through fraud or corruption.

B. Rule 11

The Eleventh Circuit has identified three types of conduct by an attorney or party that warrant the imposition of Rule 11 sanctions. First, sanctions are warranted where a party or attorney files a pleading or other paper that has no reasonable factual basis. Second, sanctions are warranted where a party or attorney advances a legal theory that has no reasonable chance of success under the decisional or statutory law and that cannot be advanced as a reasonable argument to reverse, modify, or extend the law. Finally, sanctions are warranted where a party or attorney files a motion or pleading for purposes of harassment or delay. *See United States v. Milam*, 855 F.2d 739, 742 (11th Cir. 1988); *accord Baker v. Alderman*, 158 F.3d

516, 524 (11th Cir. 1998).

Defendants Mayoue and Gray notified Plaintiff by letter on September 5, 2001, of their intention to pursue Rule 11 sanctions; Defendant Chandler notified Plaintiff on December 27, 2001; Defendant Titelman on September 27, 2001, and Defendant Woods on November 11, 2001. Defendants Chandler and Woods are the only Defendants who proffered information on the actual amount of attorney's fees they have expended in the litigation. Defendant Chandler testified that his fees and expenses totaled nearly $19,937.87. Defendant Woods testified her fees were $11,531.25. The other Defendants intend to supplement the record with their demand for attorney's fees.

Defendants here argue that Plaintiff's conduct in the instant litigation warrants sanctions under all three circumstances addressed in Rule 11. Specifically, Defendants contend that Plaintiff pursued litigation in federal court in order to harass Defendants and to relitigate the issues in her divorce and custody proceedings.

Defendants also assert that the Georgia law governing the effect of a judge's denial of a motion for a directed verdict, set forth in *Monroe v. Sigler*, 256 Ga. 759 (1987), is clear and Plaintiff did not have a reasonable argument to modify that law. Finally, Defendants assert that Plaintiff had no facts to support her complaint. Plaintiff's sole response to these arguments is her contention that *Monroe* is not controlling and a subsequent opinion by the Georgia Court of Appeals is a sufficient, non-frivolous argument to distinguish *Monroe*.

Rule 11 incorporates an objective standard of "reasonableness under the circumstances." *Donaldson*, 819 F.2d at 1556. The court's inquiry focuses only on the merits of the objectionable paper "gleaned from facts and law known or available to the attorney at the time of filing." *Jones v International Riding Helmets, Inc.*, 49 F.3d 692, 694-95 (11th Cir. 1995) (emphasis in original). In this circuit, courts considering Rule 11 sanctions must engage in a two-step inquiry: (1) whether the party's claims are

objectively frivolous; and (2) if so, whether the person who signed the objectionable papers should have been aware that the claims were frivolous. *See. E.g., Baker*, 158 F.3d at 524; *Jones*, 49 F.3d at 695. In determining the reasonableness of a paper's legal basis, "a court may consider the time available to prepare the pleading; the complexity of the legal issues; the plausibility of the argument; and whether the party is proceeding pro se." *Pelletier v. Zweifel*, 921 F.2d 1465, 1514 n.88 (11th Cir. 1991).

C. Analysis

1. Legal and Factual Sufficiency of Plaintiff's Complaint

At an October 18, 2001 discovery conference, the court specifically reminded Plaintiff of her obligations under Rule 11 and repeatedly warned Plaintiff of the risks attendant to pursuing this litigation. See Transcript of October 18, 2001, Hearing, at unnumbered pages 4-5 ("I am satisfied [further pleadings] will be reviewed carefully for Rule 11 violations. And I'm not absolving

you of any that may have happened in the past, but I am pointing out to you that Rule 11 exists and you need to be very careful about what you allege. It's a whole lot easier for me to let you amend the case if you got good grounds than it is for me to protect you from paying fees of your opponent if you didn't have good grounds."); at 13 ("I don't want to be heavy handed with the Plaintiff, but let me tell you that the last one of these spite malice contests I had in federal court that came out of a child custody case ended up costing the plaintiff and his counsel either 40 or $70,0000 before it was all over with. . . . I want you to realize that you may be spending your own money with your zeal. So you may want to be real careful here."); at 25 (if Plaintiff's counsel maintains there was no probable cause in the case "in the face of what seems to be the Georgia law, that if it went to a jury over a motion for a directed verdict, he may have Rule 11 problems"; if Plaintiff's counsel can allege a theory that there was no probable cause, he would not face Rule 11 sanctions later, "if he does it wrong, it could get expensive.") at 28 ("But if it turns out you

allege it and you had no reasonable basis on which to allege it, and they move for Rule 11 sanctions, and they do what they do to - with the safe harbor provision, then I'll impose sanctions. That's what I'm trying to get you to understand."); at 33 ("I am faced, to be honest with you, with a complaint that reads like a press release and a gragment of a transcript that reads like there is no case at all here. And so I want to make sure that plaintiffs have got their guns loaded and I want to make sure they are taking this seriously. . . . I'm being very candid with what I'm doing here as a manager of this case. If you want to protect yourself on Rule 11 sanctions, read the law.").

Despite these clear admonitions, Plaintiff filed an amended complaint that the court determined in its August 8, 2002 order, was wholly insufficient to cure the deficiencies in the first complaint. As the court noted in its order, Plaintiff's initial complaint failed to make specific claims against the named Defendants and failed to allege that Judge Flournoy's order was procured through fraud or corruption. The court granted Plaintiff additional time to amend her

complaint and address these deficiencies. In her amended complaint, Plaintiff added an allegation that Defendant Chandler falsely testified before a Cobb County Grand Jury in December 2000 and that Defendants Woods and Titelman "provided knowingly false and/or incomplete material information to the criminal jury." As the court noted in its order, however, on its face, Plaintiff cannot show that the provision of "incomplete" information satisfies the elements of malicious prosecution in Georgia. Plaintiff also added a summary of allegations that "all defendants directly and jointly" aided in the malicious prosecution. Finally, despite the specific instruction of the court that Plaintiff should allege facts that would show that Judge Flournoy's order was tainted by fraud and corruption, Plaintiff failed altogether to amend her complaint to address this deficiency. As the court had explained in its August 8 order, the summary of allegations did not cure Plaintiff's complaint of its "shotgun" nature or its deficiencies with respect to Judge Flournoy's ruling. The court finds it relevant that at the time Plaintiff was granted leave to amend her

complaint, Plaintiff had already taken the depositions of Cobb County District Attorney Patrick H. Head, prosecuting attorney Francie Hakes and Rose Wing of the District Attorney's Office in the instant litigation. Plaintiff also had access to the entirety of the testimony in her criminal trial. Despite the availability of this information, Plaintiff failed to allege in her amended complaint facts against each Defendant with any particularity and failed to allege that Judge Flournoy's ruling was procured through fraud or corruption. As the court explained above, even when considering Plaintiff's general allegations, none would affect whether Judge Flournoy's ruling was the product of fraud or corruption. When a plaintiff fails to respond to a court's order for a more particular pleading, "the court should strike his pleading, or, depending on the circumstances, dismiss the case and consider the imposition of monetary sanction." *Byrne v Nezhat*, 261 F.3d 1075, 1129-34 (11th Cir.2001) (discussing

the problems occasioned by shotgun pleadings).[1]

Any lawyer facing prosecution of this suit would have run into the undistinguishable precedent of *Monroe* which holds that the denial of a directed verdict after the presentation of the state's evidence - in the absence of fraud or corruption - conclusively establishes probable cause for the purposes of a malicious prosecution suit. Plaintiff's lawyer had no choice but to show that Judge Flournoy's decision was procured by fraud. On the basis of the criminal trial record available to all parties, every fact now alleged to be critical was known by Judge Flournoy when he made his decision. Further, it is apparent to this court that Plaintiff's counsel cannot articulate how any individual Defendant procured by deceit or fraud Judge Flournoy's rulings. There is simply no nexus

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1. Although the court is not convinced that Plaintiff forwarded a reasonable argument to distinguish the "mandatory inference" required by Monroe, the court finds the lack of factual support for Plaintiff's allegations, as well as it determination that Plaintiff pursued this litigation for the purpose of harassment to be sufficient bases on which to impose sanctions.

between the alleged actions of Defendants and the ruling made by the Judge. Under *Byrne* and Rule 11, therefore, the court finds that monetary sanctions are appropriate.

2. Harassment

Additionally, in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), the Eleventh Circuit instructed district courts when considering whether a claim was filed and prosecuted in bad faith "to examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." *Id.* At 1515. In making this assessment, the *Pelletier* court considered the "shotgun" nature of the plaintiffs' pleadings which were "replete with factual allegations that could not possibly be material to any of the causes of actions they assert." *Id.* At 1517-18. The court also found that plaintiffs' counsel had prosecuted the case in bad faith because he knew at the outset that plaintiffs' claims were meritless. *Id.* At 1520. Finally, the court determined that monetary sanctions were warranted. *Id.* At 1521.

With these guidelines in mind, the court has considered the information presented by the parties at the October 18 discovery conference as well as all pleadings filed in this case and finds that Plaintiff abused the litigation process by using the instant federal suit as an attempt to relitigate the issues involved in the underlying divorce and custody proceedings. Plaintiff continued to take this tactic despite specific and clear warnings from the court that this strategy was not relevant to Plaintiff's cause of action for malicious prosecution and would not be tolerated. For example, in its first order issued in this litigation, the court directed that certain statements be stricken from Plaintiff's complaint. Specifically, the court instructed Plaintiff that the letter written by some members of the jury that deliberated in her criminal trial would not be considered by this court because the jury had not made any findings with respect to maliciousness while they were empaneled as a jury. Despite this ruling and discussion of this issue at the discovery conference, Plaintiff repeated and referred to the contents of the jury letter in her

response to Defendants ' motions to dismiss. Moreover, Plaintiff's argument that such a letter rendered the denial of her motion for a directed verdict by Judge Flournoy to be "invalid" is without any basis in the law.

Similarly, the court reminded Plaintiff that her defense in the criminal prosecution - that she took the children to Mississippi to protect them from their father - was not an issue in the malicious prosecution suit. *See* Hearing Transcript, at 37 (advising Plaintiff's counsel that allegations of sexual abuse were not to be raised). Despite these clear admonitions, Plaintiff again raised these issues in her response to Defendants' motions to dismiss and motions for sanctions. Plaintiff alleged that Mr. Titelman did sexually abuse the children and his testimony in the criminal trial to the contrary was fraudulent and deceitful. Plaintiff argues that had Mr. Titelman admitted his guilt during her criminal prosecution, Judge Flournoy "would have directed a verdict of acquittal in a heartbeat and would have ordered Mr. Titelman's arrest." *See* Supplemental Motion, at 4. Furthermore, in her response to

Defendants' motions for sanctions, Plaintiff contends that "it is well documented that child molesters routinely pass polygraphs." *See* Response, at 1-2 n.1. As explained in its previous order, these allegations do not show that Judge Flournoy's ruling was procured through fraud or corruption and are irrelevant to Plaintiff's claim of malicious prosecution. When he ruled on Plaintiff's motions for directed verdict, Judge Flournoy had before him Mrs. Titelman's contention that she took the children to Mississippi to protect them from their father and Mr. Titelman's testimony to the contrary. Thus, no fraud was perpetrated against Judge Flournoy with respect to the allegations of sexual abuse. Furthermore, as the court explained above, none of Plaintiff's allegations in her amended complaint was relevant to the central issue of whether Judge Flournoy's ruling was procured through fraud or corruption.

Finally, in analyzing the circumstantial evidence available to the court, it is evident from statements made by Plaintiff's counsel that the federal suit was not undertaken for legitimate purposes, but rather was an attempt to elicit further discovery for use in Plaintiff's underlying divorce

and custody proceedings and as a sidelight to Plaintiff's and Plaintiff's counsel's personal crusade against Defendants in this litigation. On April 29, 2002, Plaintiff's counsel wrote an open letter to the Members of the Cobb County Bar and the Metro Atlanta Mental Health Professionals in which he recounts Plaintiff's disagreements with the manner in which the state courts and Defendant Woods acted during the divorce and custody proceedings. Plaintiff then forwarded her counsel's letter and a personal recollection to numerous people. In her personal statement, Plaintiff asserts that "we are[] taking it to the peers of those who are guilty, and we are charging these people to hold Diane Woods and Elizabeth King accountable. *We will continue to fight in both state and federal court.*" *See* Supplemental Pleading of Diane Woods, Exh. 6 (emphasis added).[2] Furthermore, Defendants aver, and Plaintiff does not deny, that Plaintiff has already attempted to insert the limited discovery that took place in the instant litigation into her ongoing divorce and custody proceedings. As

2. The court GRANTS Defendant Woods' motion for leave to file supplemental pleading to motion for Rule 11 sanctions [73-1].

the court painstakingly explained to Plaintiff in the October 18 discovery conference, federal court is not the forum to relitigate her complaints from the underlying divorce and custody proceedings. The court explained to Plaintiff the elements of malicious prosecution in Georgia and the deficiencies Plaintiff would need to cure in order to survive Defendants' motions to dismiss. Plaintiff chose not to cure those deficiencies.

Plaintiff and her counsel may desire to engage in a public relations campaign to discredit her divorce and custody proceedings, but federal court is not the appropriate forum for that campaign. Based on the facts and circumstances available to the court, it is clear that Plaintiff and her counsel did not initiate the instant litigation in an attempt properly to pursue a malicious prosecution claim. Rather, Plaintiff and her counsel saw a suit in federal court simply as another forum for their public relations campaign. Rule 11 sanctions may be imposed for "the purpose of deterrence, compensation, and punishment." *Aetna Ins. Co. v. Meeker*, 953 F.2d 1328, 1334 (11th Cir. 1992). The court determines

that monetary sanctions are appropriate in this case. The court believes that sanctions will deter such behavior in the future while not chilling an attorney's appropriate zeal in pursuing novel legal theories.

As such, the court GRANTS Defendants' motions for Rule 11 sanctions against Plaintiff's counsel.[3] Defendants Titelman, Chandler, Mayoue, Gray, and Woods are DIRECTED to file a petition for attorney's fees within fifteen (15) days from the filing date of this order. In considering attorney's fees, the court is guided by the instructions of *Norman v. Housing Authority*, 836 F.2d 1292 (11th Cir. 1988), and *ACLU v. Barnes*, 168 F.3d 423 (11th Cir. 1999), and expects Defendants' fee petitions to be filed in conformance with those cases. After Defendants have submitted their fee petitions, Plaintiff's counsel has fifteen (15)

3.The court would be authorized to impose sanctions on both Plaintiff and her counsel if information before the court showed specifically that Plaintiff, herself, violated Rule 11. See Baker v. Alderman, 158 F.3d 516, 526 (11th Cir. 1998). Although the court has available Plaintiff's e-mail forwarding the letter of Plaintiff's counsel, Plaintiff's counsel's is the only signature on her complaint, and Plaintiff did not attend the October 18, 2001, discovery conference where the court set for the basis for much of its instant order. As such, the court imposes monetary sanctions on Plaintiff's counsel only.

days to pay the attorney's fees to Defendants or file objections with the court.

II Conclusions

The court GRANTS Defendants Mayoue and Gray's motion for sanctions pursuant to Rule 11 [58-1]; GRANTS Defendant Chandler's motion for Rule 11 sanctions [59-1]; GRANTS Defendant Titelman's motion for sanctions pursuant to Rule 11 [62-1]; GRANTS Defendant Woods' motion for Rule 11 sanctions [71-1]; and GRANTS Defendant Woods' motion for leave to file supplemental pleading to motion for Rule 11 sanctions [73-1].

SO ORDERED this 16th day of September 2002

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WENDY JANE TITELMAN,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	NO. 1:01-CV-1845-JOF
	:	
ANDREW CHARLES TITELMAN	:	**Filed JUL 29 2003**
CRAIG CHANDLER, JOHN MAYOUE,	:	
PAMELA GRAY, DIANE WOODS,	:	
	:	
Defendants.	:	

ORDER

This matter is before the court on motion for clarification [89-2]; Defendant Woods' motion for attorney's fees [90-1]; Defendants Mayoue and Gray's motion for attorney's fees [91-1]; Defendant Titelman's motion for attorney's fees [92-1]; Defendant Chandler's motion for attorney's fees [93-1]; motion for hearing [99-1]; and Defendant Chandler's motion for leave to file sur-reply [100-1].

I. Procedural History

The facts and circumstances surrounding this case are set forth

in detail in the court's prior orders of November 8, 2001, August 8, 2002, and September 17, 2002. In its last order, the court granted Defendants' motions for sanctions against Plaintiff's counsel pursuant to Rule 11. The court directed Defendants to file petitions for attorney's fees in accordance with the dictates of *Norman v. Housing Authority*, 836 F.2d 1292 (11th Cir. 1988), and *ACLU v. Barnes*, 168 F.3d 423 (11th Cir. 1999). Defendants each filed the required fee petitions, and Plaintiff did not respond, indicating no opposition. *See* LR 7.1B, N.D. Ga. Subsequently, Plaintiff's local counsel, Michael Hirsh, filed a motion for clarification or modification arguing that he should not be liable for any portion of the Rule 11 sanctions imposed by the court. Defendants Gray, Mayoue, Woods, and Chandler opposed Mr. Hirsh's motion. The court held a hearing on April 23, 2003, to consider Mr. Hirsh's arguments.[1]

II. Discussion

A. Motion for Clarification or Modification

Richard Ducote, an attorney in Louisiana, contacted Michael

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1. The court GRANTS Mr. Hirsh's motion for hearing [99-1].

Hirsh, an attorney in Georgia, to act as local counsel in Plaintiff's lawsuit. Mr. Hirsh signed Plaintiff's initial complaint and signed Mr. Ducote's *pro hac* vice application. Mr. Hirsh attended a conference held on October 16, 2001, representing Plaintiff, and Mr. Ducote participated in that conference by telephone. During the conference, the court put both of Plaintiff's counsel on notice as to the court's concerns about Plaintiff's complaint and the potential for sanctions pursuant to Rule 11 up to and including an award of attorney's fees expended by all Defendants. The court gave Plaintiff the opportunity to file an amended complaint to cure the defects pointed out by the court. Plaintiff did file an amended complaint which the court determined was inadequate as a matter of law. Mr. Ducote actually signed the amended complaint and while Mr. Hirsh did not put a signature on the document, he and his firm are listed on the amended complaint as local counsel for Plaintiff. Mr. Hirsh never withdrew as counsel and remained on the certificate of service for all pleadings entered in the case. Mr. Hirsh did file a change of address notification.

Mr. Hirsh contends that he should not be subject to the Rule 11 sanctions imposed by the court because he did not sign the amended complaint and therefore has taken no action which would trigger Rule 11. He states that Rule 11 provides that if a pleading is not signed, the court should strike it. Mr. Hirsh further contends that he was acting *pro bono* in his capacity as local counsel and did not expect any compensation for his efforts. He argues that he did not act in "bad faith," and therefore the court cannot impose sanctions against him pursuant to Rule 11. Mr. Ducote also provided an affidavit testifying that Mr. Hirsh took "no part in drafting the Amended Complaint, signing the Amended Complaint, filing the Amended Complaint, or in any subsequent advocacy of anything in the Amended Complaint." Affidavit of Richard Ducote, November 21, 2002. Mr. Ducote further averred that he was "fully and solely responsible for the content of the pleadings and the strategy employed by Plaintiff." *Id.*

Defendants contends that Mr. Hirsh acted as local counsel throughout the litigation and did not disavow Plaintiff's amended

complaint with his name and bar number even if he did not actually affix his signature to the document. Defendants argue that Mr. Hirsh's continued representation of Plaintiff, including filing a change of address notification in this case constitute the "later advocacy" that triggers Rule 11. Defendants further contend that as local counsel, Mr. Hirsh is responsible for the conduct of Mr. Ducote acting *pro hac vice* upon the application proffered by Mr. Hirsh.[2]

The court does not doubt the sincerity of Mr. Hirsh's belief that he did not engage in this litigation in bad faith. However, there is no "bad faith" requirement to trigger the imposition of Rule 11 sanctions. *See Hashemi v. Campaigner Publications, Inc.*, 784 F.2d 1581, 1583 (11th Cir. 1986) (noting that 1983 amendment to Rule 11 abrogated the bad faith standard in favor of more stringent objective standard). The court also has no reason to doubt the testimony of Mr. Ducote that he, and not Mr. Hirsh, drafted the amended complaint. Mr. Hirsh, however, need not

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2. The court GRANTS Defendant Chandler's motion for leave to file sur-reply [100-1].

actually have signed the amended complaint in order for Rule 11 to be implicated. In *Turner v. Sunguard Business Systems, Inc.*, 91 F.3d 1418 (11th Cir. 1996), the court considered the imposition of Rule 11 sanctions against counsel who had substituted for the plaintiff's original counsel in an employment discrimination case. The substitute counsel had argues that because he did not sign the plaintiff's original complaint, he had taken no action that triggered Rule 11. *Id* at 1421. The court held, however, that counsel's argument "ignore[d] the plain language of Rule 11, which merely requires 'papers' to be 'present[ed]' to the court." *Id.* Further, the court noted that Rule 11 applies to all papers filed in a suit. *Id.* The court found that because counsel had filed a notice of appearance in the case, he was "later advocating" that the "factual contentions [in the complaint] ha[d] evidentiary support." *Id.* (noting that by filing a notice of appearance, counsel had essentially refiled the plaintiff's complaint). Here, Mr. Hirsh filed a change of address notification with the court. As the notice of appearance in *Turner*, the court finds this is sufficient "later

advocacy" to trigger Rule 11 sanctions.[3]

Mr. Hirsh cannot claim that he was unaware of the litigation tactics employed by Mr. Ducote because Mr. Hirsh is on the certificate of service for every pleading filed in the case. He received Defendants' Rule 11 "safe harbor" letters and the orders of this court. Yet, Mr. Hirsh did not give any indication that he did not support Plaintiff's strategic decisions. Most notably, Mr. Hirsh did not withdraw as counsel.

Furthermore, the court cannot ignore the duties Mr. Hirsh took on when he agreed to act as local counsel for Mr. Ducote. Mr. Hirsh signed Mr. Ducote's *pro hac vice* application without which Mr. Ducote would not have had access to this court. Under this court's local rules, Mr. Hirsh, as local counsel, is also required to sign every pleading that

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3. For the reasons stated in *Turner*, the court finds that *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987) and *Harris v. Marsh*, 1988 U.S. Dist. LEXIS 13071 (E.D.N.C. Sept. 30, 1988), cited by Mr. Hirsh in his "supplemental authority" brief, are inapposite. Here, the court determined that Mr. Hirsh "later advocated" Plaintiff's amended complaint when he filed a notice of change of address. In *Robinson and Harris*, the court considered only whether the attorney placed his actual signature on a pleading.

is filed with the court by a *pro hac vice* attorney; a duty Mr. Hirsh's "no signature" defense ignores. *See* LR 83.1B(2). Under these circumstances, the court finds it has no choice but to include Mr. Hirsh in its order granting Rule 11 sanctions. To do otherwise would be to ignore the responsibilities and duties incumbent on local counsel. *See, e.g., Sanders v. Russell*, 401 F.2d 241, 248 (5th Cir. 1968) (use of local counsel "satisfies the reasonable interest of the District Court in having a member of its Bar, who is subject to the court's general control, be professionally responsible for the litigation and who can be served with papers, can be notified of hearings and can be held accountable if anything reflecting on the Court of an abuse of its process occurs during the course of the litigation."). The court DENIES Mr. Hirsh's motion for clarification [89-1] or modification [89-2].

B. Attorney's Fees

In order to analyze an application for attorney's fees, the court must first "multiply hours reasonably expended by a reasonable hourly rate." *Norman v. Housing Auth.*, 832 F.2d 1292, 1299 (11th Cir. 1988).

"A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Id.* "Satisfactory evidence at a minimum is more than the affidavit of the attorney performing the work." *Id.* If a party provides only an affidavit from the attorney who performed the work, the court must apply "its own knowledge and expertise concerning reasonable and proper fees." *Id.* At 1303. The court must next look at whether the hours charged are reasonable, excluding "excessive, redundant or otherwise unnecessary" hours. *Id.* At 1301 (citation and quotation omitted). The "fee applicant bears the burden of establishing entitlement and documenting the appropriate hours and hourly rates." *ACLU v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999). That burden includes "supplying the court with specific and detailed evidence from which the court can determine the reasonable hourly rate." *Id.* (citing *Norman*, 836 F.2d at 1303).

1. Defendant Titelman

Defendant Titelman seeks total attorney's fees in the amount of

$30,769.74 for work done by Thomas E. Cauthorn III and John E. Hall, Jr. Mr. Cauthorn testified that his billing rate is $250 per hour and he billed Defendant Titelman $10,946.25. Mr. Cauthorn testified that he also billed $533.38 in costs that were not awarded in the bill of costs. Mr. Cauthorn did not testify as to the billing rates of any other individuals affiliated with his law firm and did not provide the affidavit of any attorney indicating that his billing rate is reasonable for attorneys of his experience in this area of the law. Furthermore, although Mr. Cauthorn provided the invoices sent to his client, he did not provide a total number of hours he worked on this matter to the court. The billing invoices submitted to the court list a variety of individuals who worked on this matter. As such, the court cannot ascertain which of the items listed on the invoices are actually being charged in his fee petition. Furthermore, although Mr. Cauthorn has limited his expenses request to those expenses not covered in the bill of costs, he has not indicated to the court what expenses are sought in the $533.38 request. Thus, the court awards only $5,000 in attorney's fees requested by Mr. Cauthorn on

behalf of Defendant Titelman and awards no costs.

Defendant Titelman also provided the affidavit of attorney John E. Hall, Jr., of Hall, Booth, Smith & Slover, P.C., to support his request for attorney's fees of $19,104.50. Mr. Hall testified that his billing rate is $130 per hour. He further testified that the billing rates of attorneys Jack Gresh and Abdi Ammari were $110 per hour; paralegals Robin Correll, Marti Hendrix, and Mr. Gresh (prior to his becoming an attorney licensed in the state of Georgia) billed at $85 per hour. Mr. Hall billed 53.3 hours; Mr. Gresh, 33.8, and Ms. Ammari, 14.7. Ms. Correll billed 15.7, Ms. Hendrix, 1.6, and Mr. Gresh, 77.0. Mr. Hall also stated that his firm had expended $185.61 in costs not awarded in the bill of costs.

Mr. Hall did not provide the affidavit of any attorney indicating that their billing rates are reasonable for attorneys of their experience in this area of the law. In its judgment, the court finds that an hourly rate of $130 for a partner, $110 for an associate, and $85 for a paralegal is reasonable. In exercising its billing judgment, the court disallows the following fees: Robin Correll - September 20, 2001 (0.2), September 25,

2001 (0.8), September 26, 2001 (0.3), and October 12, 2001 (0.3); Jack Gresh - October 2, 2001 (1.0), October 3, 2001 (11.0), October 22, 2001 (2.4), October 23, 2001 (0.2), October 24, 2001 (2.5), December 27, 2001 (1.0), and July 31, 2002 (1.0). These generally cover telephone conferences with co-counsel, duplicative efforts, and research relating to *pro hac vice* status of Plaintiff's counsel, which the court does not find integral to the legal defense of Defendant Titelman. Although Mr. Hall has limited his expenses request to those expenses not covered in the bill of costs, he has not indicated to the court what expenses are sought in the $185.61 request. Thus, the court does not award any costs. In sum, the court disallows $1809.50 in attorney's fees on Mr. Hall's affidavit and allows $17,295.00. The total fees awarded for Defendant Titelman's defense is $22,295.00.

2. Defendant Chandler

J. Anderson Davis testified that he bills at a rate of $125 per hour; his associate, Kristy Cordle, bills at $110 per hour; and their paralegal, Becca Coble, at $65 per hour. The attorneys billed 110 hours

in Defendant Chandler's defense and Ms. Coble billed 39 hours. The total legal fees requested are $27,412.00 and expenses are $6,528.80, for a total of $33,940.80. Defendant Chandler provided the affidavit of attorney Ronald R. Womack of The Womack Law Firm to affirm that the rates billed by Defendant Chandler's attorneys are reasonable. Defendant Chandler also submitted the billing invoices to support his fee petition.

Defendant Chandler seeks $6,528.80 in costs. A review of the documents indicates these costs encompass such items as photocopying, mailing, and computer research. The court notes, however, that costs in the amount of $5,813.46 were awarded in favor Defendant Chandler on September 3, 2002. Defendant Chandler does not show to the court whether any of the costs he seeks in his Rule 11 motion were already awarded in his bill of costs. Thus, the court declines to award any costs to Defendant Chandler.

In exercising its billing judgment, the court disallows the following fees from Ms. Coble: August 29, 2001 (0.9), April 23, 2002

(0.4), April 29, 2002 (1.0), Mary 29, 2002 (0.6), July 10, 2002 (0.7), and July 12, 2002 (0.9); from Ms. Cordle: September 19, 2001 (0.5), September 20, 2001 (0.5), September 21, 2001 (2.0), and February 15, 2002 (0.4); from Mr. Davis: November 21, 2001 (0.7), January 11, 2002 (0.3), June 13, 2002 (0.5), July 10, 2002 (0.3), September 13, 2002 (0.8), September 17, 2002 (0.3), and September 18, 2002 (0.4). These generally cover categories of case status preparation and litigation plans, notification to insurers, and appellate work which the court finds are not relevant to the legal defense of Defendant Chandler. In sum, the court disallows $1079 and allows $26,333.

3. Defendant Woods

Defendant Woods seeks $15,637.50 in attorney's fees. Woods' attorney Jerry Gentry testified that his regular billing rate is $225 per hour, but as a professional courtesy to Defendant Woods he was billing at $125 per hour. Mr. Gentry provided the affidavit of Theodore Freeman to certify that $125 was a reasonable hourly rate for his services. Mr. Gentry also testified that he expended 125.10 hours in

representing Defendant Woods. Mr. Gentry attached the actual billing records of his services to Defendant Woods as well as a summary of those services in support of his petition for attorney's fees. The court has reviewed the billing invoices provided by Mr. Gentry and determines that all charges are supported in the record. Accordingly, the court awards Defendant Woods' attorney's fees of $15,637.50.

4. Defendants Mayoue and Gray

James T. McDonald, Jr. and Robert S. Huestis provided legal services on behalf of Defendants Mayoue and Gray. Mr. McDonald expended a total of 53.50 hours at a rate of $175 per hour for a total of $9,362.50. Mr. Huestis expended 120 hours at an hourly rate of $110 for a total of $13,200. In the fee petition, Messrs. McDonald and Huestis provided billing invoices and a summary of the legal work conducted for Defendants Mayoue and Gray. They did not, however, provide the affidavit of any attorney indicating that their billing rates are reasonable for attorneys of their experience in this area of the law.

In its judgment, the court finds that an hourly rate of $175 for a

partner and $110 for an associate is reasonable. In exercising its billing judgment, the court disallows the following fees from Mr. McDonald. August 3, 2001 (0.4), August 7, 2001 (0.4), August 8, 2001 (0.1), August 13, 2001 (0.1), August 15, 2001 (0.5), August 21, 2001 (0.1), September 9, 2001 (0.4), September 10, 2001 (0.3), September 11, 2001 (0.3), September 12, 2001 (0.1), October 18, 2001 (1.6), November 2, 2001 (0.1), December 31, 2001 (0.4), February 4, 2002 (0.1), February 5, 2002 (0.3), February 6, 2002 (0.2), February 7, 2002 (0.2), February 20, 2002 (0.4), April 11, 2002 (0.2), June 11, 2002 (0.3), August 18, 2002 (0.3), August 21, 2002 (0.1), August 28, 2002 (0.2), and September 13, 2002 (0.3). The court also disallows the following from Mr. Huestis: August 9, 2001 (1.8), August 21, 2001 (0.3), August 31, 2001 (0.2), October 4, 2001 (0.8), October 8, 2001 (0.3), February 6, 2002 (1.7), September 6, 2002 (0.3, and September 11, 2002 (0.3). These generally cover categories of notification of case status to insurance carrier, research of time deadlines, and telephone conversations with media representatives concerning the case, which the court finds are not relevant to the legal

defense of Mayoue and Gray. In sum, the court disallows $1922 and allows $20,640.05 in attorney's fees for Defendants Mayoue and Gray.

II Conclusion

The court DENIES Mr. Hirsh's motion for clarification [89-1] or modification [89-2]; GRANTS Defendant Woods' motion for attorney's fees [90-1]; GRANTS Defendants Mayoue and Gray's motion for attorney's fees [91-1]; GRANTS Defendant Titelman's motion for attorney's fees [92-1]; GRANTS Defendant Chandler's motion for attorney's fees [93-1]; GRANTS Mr. Hirsh's motion for hearing [99-1]; and GRANTS Defendant Chandler's motion for leave to file sur-reply [100-1].

Mr. Hirsh and Mr. Ducote are DIRECTED jointly and severally to pay attorney's fees of $22,295 to Defendant Titelman, $26,333 to Defendant Chandler, $15,637.50 to Defendant Woods, and $20,640.05 to Defendants Mayoue and Gray. The total fees awarded are $84,905.55. These fees must be paid within fifteen (15) days from the date of this order or Mr. Ducote's *pro hac vice* admission to the United States

District Court the Northern District of Georgia is suspended.

SO ORDERED this 29th day of July 2003.

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WENDY JANE TITELMAN,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	NO. 1:01-cv-1845-JOF
	:	
ANDREW CHARLES TITELMAN	:	
CRAIG CHANDLER, JOHN MAYOUE,	:	
PAMELA GRAY, DIANE WOODS,	:	
	:	
Defendants.	:	

JUDGMENT

This action having come before the court, Honorable J. Owen Forrester, United States District Judge, for consideration of defendants' motion(s) for attorney's fees, and the court having granted said motion(s), it is

Ordered and adjudged that defendant Titelman recover $22,295, defendant Chandler recover $26,333, defendant Woods recover $15,637.50, defendants Mayoue and Gray recover $20,640.05 from Mr. Hirsh and Mr. Ducote JOINTLY AND SEVERALLY as reasonable

attorney's fees.

Dated at Atlanta, Georgia this 29th day of July, 2003.

LUTHER D. THOMAS
Clerk of court

By: Andrea Gee, Deputy Clerk

Prepared, filed, and entered
in the Clerk's Office
July 30, 2003
Luther D. Thomas
Clerk of Court

By: Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-14429

D. C. Docket No. 01-01845-CV-JOF-1

MICHAEL R. HIRSH,
RICHARD L. DUCOTE,

Filed Jun 02 2005

Movants-Appellants,

versus

ANDREW CHARLES TITELMAN
CRAIG CHANDLER, et. al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(February 8, 2005)

Before BARKETT, MARCUS and SUHRHEINRICH*, Circuit Judges.

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*Honorable Richard F. Suhrheinrich, United States Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

Richard L. Ducote and Michael R. Hirsh, counsel for Plaintiff Wendy Titelman, appeal from the district court's order imposing sanctions on them pursuant to Rule 11 of the Federal Rules of Civil Procedure, and awarding attorney's fees in favor of Appellees.[1] Because the district court did not abuse its discretion, we affirm.

I.

This appeal stems from an underlying malicious prosecution action filed by Ms. Titelman in the United States District Court for the Northern District of Georgia, which in turn arose out of underlying divorce and child custody proceedings between Andrew and Wendy Titelman. The divorce decree awarded sole legal and physical custody of the Titelmans' two minor children to Mr. Titelman; Ms. Titelman received weekend and holiday visitation privileges. After Ms. Titelman

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2. This Court has granted Hirsh's motions to dismiss from his appeal, with prejudice, defendants Andrew Charles Titelman, Craig Chandler, and Diane Woods. In this decision, we affirm the district court's judgment as to the remaining parties.

failed to return the children following a scheduled visitation, Mr. Titelman swore out a misdemeanor arrest affidavit alleging that Ms. Titelman had interfered illegally with the child custody order. An arrest warrant was subsequently issued for Ms. Titelman for felony interstate interference with custody.

Ms. Titelman was subsequently tried on the felony charge. At the trial, Ms. Titelman moved twice for a directed verdict of acquittal. The trial court denied both motions, but the jury eventually found her not guilty.

Ms. Titelman then filed a malicious prosecution action against Mr. Titelman, Craig Chandler, John Mayoue, Pamela Gray and Diane Woods. Ms. Titelman claimed that the five defendants had conspired to initiate and maintain the prosecution in order to punish her for seeking to protect the children from Mr. Titelman's alleged sexual abuse and to protect those who covered up the alleged abuse. In support of these allegations, Ms. Titelman attached a copy of an undated letter written by six members of the jury to the Cobb County District Attorney and to the

Superior Court judge presiding over the custody case, stating those jurors' view that the prosecution had been improper.

The initial complaint was signed both by Ducote – a Louisiana lawyer admitted pro hac vice to the Northern District of Georgia to represent Ms. Titelman in her malicious prosecution case – and Hirsh, who was local counsel in this case and represented Ms. Titelman during the initial criminal trial.

At the discovery conference, the district court excluded the jury letter and all references to "the dispute over harassment of the children by the husband." The district court also entered a stay of discovery on all matters except those concerning the district attorney's office responsible for the prosecution. The court then required Ms. Titelman to present a more definite statement alleging the elements of the malicious prosecution tort under Georgia law and "what each defendant did that got them sued." The court explained that Ms. Titelman's case as pled was flawed fatally because (1) the criminal trial judge's denial of her motions for a directed verdict established probable cause for the

criminal prosecution, and (2) no information suggested that the state trial judge's rulings were corrupt or obtained by fraud.

Hirsh attended the discovery conference as local counsel, and Ducote attended by telephone. The district court explicitly warned both Hirsh and Ducote that the "allegations . . . will be reviewed carefully for Rule 11 violations. And I'm not absolving you of any that may have happened in the past, but I am pointing out to you that Rule 11 exists and you need to be very careful about what you allege." Indeed, the court warned Ducote and Hirsh several more times to be careful with their allegations "because you may be spending your own money," and advised Ducote that if he insisted on resubmitting the pleadings based on his suggested interpretation of Georgia malicious prosecution law, he was "liable to end up paying for [his[own entertainment." "If you want to protect yourself on Rule 11 sanctions," the court added, "read the law."

Ms. Titelman subsequently filed an amended complaint in large part unchanged from the original complaint, other than the addition of several vague allegations regarding the defendants' conspiratorial

behavior. Only Ducote signed the amended complaint, but the signature page included Hirsh's name, Georgia bar number, law firm, address, and designation as local counsel.

Appellees filed motions to dismiss the amended complaint and motions for Rule 11 sanctions. Meanwhile, Hirsh filed a notice of change of address identifying himself as counsel of record.

The district court granted Appellees' motions to dismiss the amended complaint. The district court also imposed Rule 11 sanctions, ordering Ducote and Hirsh jointly and severally to pay Appellees $84,905.55 in attorney's fees. After the district court awarded sanctions, Hirsh moved to withdraw as local counsel.

We affirmed the district court's dismissal of malicious prosecution action in a related appeal, Titelman v. Titelman, No. 02-14879 (11th Cir. Oct. 29, 2004); and we now affirm the district court's imposition of Rule 11 sanctions.

II.

We review for abuse of discretion the district court's imposition

of Rule 11 sanctions. Anderson v. Smithfield Foods, Inc., 353 F.3d 912, 915 (11th Cir. 2003). A district court may award Rule 11 sanctions when a party files a pleading: (1) without a reasonable factual basis; (2) on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) in bad faith for an improper purpose. Id.

In arguing that the district court abused its discretion to award sanctions, Ducote reiterates many of the same arguments he presented in Ms. Titelman's previous appeal of the dismissal order (Titelman, 02-14879). We rejected each argument in that appeal and reject them for the same reasons in this case.

To summarize the discussion in prior appeal, Goergia law requires a plaintiff claiming malicious prosecution to show, among other things, that the prosecution was instigated without probable cause. See Ga. Code Ann. § 51-7-40; Wal-Mart Stores, Inc. v. Blackford, 449 S.E. 2d 293, 294 (Ga. 1994). The criminal trial judge's denials of Ms. Titelman's motions for a directed verdict "constitute[] a binding

determination of the existence of probably cause," unless she alleged that the trial judge's rulings were obtained through fraud or corruption. Monroe v. Sigler, 353 S.E.2d 23, 25 (Ga. 1987). But Ms. Titelman's amended complaint failed to allege that the trial judge's rulings were obtained through fraud or corruption, despite the district court's instructing Ms. Titelman's lawyers to allege these facts with particularity and allowing her to conduct discovery on the Cobb County District Attorney's Office. The amended complaint, therefore, was without a reasonable factual and legal basis, even after the district court's warnings of the possibility of Rule 11 sanctions.[2]

Ducote's attempts to distinguish this case from Monroe are without merit. Monroe was decided by the Georgia Supreme Court, and thus controlled the district court's decision. See Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 362 F.3d 1317, 1318 (11th Cir. 2004) (stating that, in a diversity action, a federal court must apply substantive

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2. Because the amended complaint was without a reasonable factual or legal basis, we need not address Ducote's argument that he did not file the amended complaint for an improper purpose.

state law and "must decide the case the way it appears the state's highest court would") (citation and internal quotation marks omitted). None of the cases Ducote cites for support came from the Georgia Supreme Court; nearly all are from Georgia's intermediate appellate courts. A number of his citations are to dissenting opinions. Moreover, none of the decisions actually create the exceptions to Monroe that Ducote seeks to invoke. It is clear to us, and should have been clear to Ducote, that Monroe compelled the dismissal of the amended complaint. The district court did not abuse its discretion in sanctioning Ducote.

Hirsh argues that sanctions against him were not proper because Ducote was required to have local counsel sign all pleadings, and because Hirsh did not sign the amended complaint. The district court or Appellees' lawyers, Hirsh suggests, should have alerted Hirsh to this omission, after which the pleading could have been stricken if he still failed to sign the amended complaint. Because he claims he did not sign, submit, file, or later advocate the amended complaint, Hirsh asserts that he is not subject to Rule 11 sanctions and that he can not be held

responsible for Ducote's sanctionable conduct. Hirsh further contends that his status as local counsel was not necessary for Ducote to practice before the Northern District of Georgia, and thus that the district court should not have blamed him for "opening the door" for Ducote.[3]

Hirsh's arguments ignore the plain meaning of Rule 11 and his role in the larger case. Rule 11 allows for sanctions when a "paper" is "present[ed]" to the court, whether by "signing, filing, submitting, or later advocating." See Fed. R. Civ. P. 11(b). Hirsh appeared as local counsel. He signed the original complaint. He was present at the discovery conference and participated in depositions. The district court specifically warned him of the applicability of Rule 11 because the allegations in the initial complaint were untenable. Although Hirsh did not sign the amended complaint, he was listed in it as local counsel. He

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3. Hirsh also argues that he should not be sanctioned if either Ms. Titelman or Ducote prevails in his or her respective appeal. He further notes that the district court could grant his motion for exoneration -- pending at the time he filed his initial appellate brief – which would render his appeal moot. Since both Ms. Titelman's and Ducote's appeals have failed, and Hirsh's motion has been denied, these arguments are without factual basis.

filed a change of address notification after Appellees moved to dismiss the amended complaint, in effect reaffirming his status as local counsel. And he did not move to withdraw until after the district court imposed sanctions.

In other words, "[b]y appearing in this case, [Hirsh] affirmed to the court that the case had arguable merit. In this sense, it was as if [Hirsh] had refiled the complaint. To use Rule 11's words, he was 'later advocating' that the 'factual contentions [in the complaint] have evidentiary support.'" Turner v. Sungard Bus. Sys., Inc., 91 F.3d 1418, 1421 (11th Cir. 1996). And by agreeing to act as local counsel for Ducote, Hirsh was ensuring the district court that he was "professionally responsible for the litigation" and could "be held accountable if anything reflecting on the Court or an abuse of its process occur[red] during the course of the litigation." Sanders v. Russell, 401 F.2d 241, 248 (5tgh Cir. 1968).[4] We would ignore the purpose of Rule 11 – and Hirsh's

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4. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decision of the former Fifth Circuit handed down prior to October 1, 1981.

responsibilities as local counsel – were we not to affirm the district court's imposition of sanctions against him.[5]

Quite simply, because the district court did not abuse its discretion in imposing Rule 11 sanctions against Ducote and Hirsh, we affirm.

AFFIRMED.

A True Copy - Attested
Clerk U.S. Court of Appeals.
Eleventh Circuit

By: Deputy Clerk
Atlanta, Georgia

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5. Because we find that the amended complaint as filed raised no claim with a reasonable chance of success, we reject Hirsh's argument that the district court's imposition of sanctions was premature and should have been delayed at least until after discovery was completed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14429-BB

MICHAEL R. HIRSH,
RICHARD L. DUCOTE,

Filed APR 15 2005

Movants-Appellants,

versus

ANDREW CHARLES TITELMAN
CRAIG CHANDLER, et. al.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia

Before: BARKETT, MARCUS and SUHRHEINRICH*, Circuit Judges.
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

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*Honorable Richard R. Suhrheinrich, United States Circuit Judge for the Sixth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

No. 05-99

IN THE

Supreme Court of the United States

RICHARD DUCOTE,

Petitioner,

v.

ANDREW TITELMAN, CRAIG CHANDLER, JOHN MAYOUE, PAMELA GRAY and DIANE WOODS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN MAYOUE AND PAMELA GRAY

JAMES T. MCDONALD, JR.
Counsel of Record
ROBERT S. HUESTIS
SWIFT, CURRIE, MCGHEE & HIERS, LLP
The Peachtree, Suite 300
1355 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 874-8800

Counsel for Respondents John Mayoue and Pamela Gray

196127

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Eleventh Circuit correctly found the District Court did not abuse its discretion in imposing Rule 11 Sanctions where (a) the pleadings were set forth for improper purposes and harassment; (b) the legal theory advanced had no reasonable chance of success under decisional and statutory law, and no good faith argument was set forth to reverse, modify or extend Georgia law of malicious prosecution; and, (c) such sanctions were premised on the absence of any reasonable factual basis to assert a malicious prosecution action?

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INTRODUCTION

Attorney Ducote's Petition does not meet any of the Rule 10 criteria. Contrary to Attorney Ducote's contentions, the Eleventh Circuit in no way departed from "the accepted and usual course of judicial proceedings . . ." The law surrounding Fed. R. Civ. P. 11 relied upon by the Courts below is settled in areas pertinent to this Court's inquiry. Likewise, the degree of deference owed by the Eleventh Circuit to the District Court is clear: The Court of Appeals will "review for an abuse of discretion the District Court's imposition of sanctions under Rule 11." *Anderson v. Smithfield Foods, Inc.*, 353 F.3d 912, 915 (11th Cir. 2003), *citing Massengale v. Ray*, 267 F.3d 1298, 1301 (11th Cir. 2001).

Attorney Ducote's Petition focuses only upon the argument he attempted to modify the law of malicious prosecution in Georgia. The District Court found and the Eleventh Circuit agreed Rule 11 sanctions were also appropriately imposed on Attorney Ducote because the claims he submitted against the prevailing parties below were submitted for improper purposes, for harassment, and were devoid of any factual support. This is especially true as to Respondents Mayoue and Gray. Fed. R. Civ. P. 11(b)(1), (3). Even if the lower Courts' decision to impose sanctions was based solely on the unreasonableness of Attorney Ducote's legal argument to modify the law, that decision is well-supported. Attorney Ducote knew then and knows now his arguments for modification of such law were frivolous and intended only to cover his improper purposes and harassment.

STATEMENT OF THE CASE

The pertinent facts are set out in the Orders of the District Court and the Eleventh Circuit included in the Appendix to the Petition for Writ of Certiorari. These Respondents do not repeat those facts here, but pursuant to this Court's Rule 15.2, address Attorney Ducote's misstatements of fact and law.

First, he contends following the underlying state court criminal trial of Mrs. Titelman, "the jury sent a scathing letter to the District Attorney." (Petition, p. 4). This is untrue. As noted by the Eleventh Circuit, a juror sent a letter signed by five (5) other jurors. [53-A] Regardless, the District Court struck "all references or exhibits in the complaint relating to the correspondence by the jury and . . . to harassment of the children by Defendant Titelman . . ." [Record below, Vol. II-.40-pg. 2-4] That ruling stands unchallenged on appeal.

Next, Attorney Ducote claims that because Judge Flournoy found the question of reasonable doubt was for the jury, he made no finding "that the evidence is sufficient as a matter of law to support a conviction . . ." (Petition, p. 6) This an incorrect statement of fact and law. By denying Mrs. Titelman's motions for directed verdict, Judge Flournoy found, as a matter of law, sufficient evidence to enable the jury, as the trier of fact, to find each and every element of the guilt of the accused beyond a reasonable doubt. *Monroe v. Sigler*, 256 Ga. 759, 761, 353 S.E.2d 23, 25 (1987).

Next, Attorney Ducote wrongly claims the Eleventh Circuit "appears to adopt a blanket rule that it is *per se* improper to craft a legal argument from intermediate court opinions and dissents." (Petition, p. 9). The Eleventh Circuit

adopted no such rule. It had no obligation to point out *ad seriatim* why Ducote's construction of Georgia law of malicious prosecution is incorrect. The Eleventh Circuit correctly found his cited cases were neither factually nor legally controlling.

Attorney Ducote's most egregious mischaracterization comes from his claim that he has "simply attempted to reasonably advocate for his client." (Petition, p. 11) What Attorney Ducote did below, and what he continues to do now, is in no way reasonable. It is abusive. As the District Court found, the genesis of the suit against Respondents was to re-litigate and obtain discovery for the underlying divorce and child custody proceedings; wage a public relations campaign against the defendants; provide further publication of Mrs. Titleman's allegations of sexual abuse against her ex-husband; and, for other improper purposes unrelated to a malicious prosecution claim in Federal Court. [23-29-A]

Finally, Attorney Ducote never, despite embroiling these Respondents in litigation since July 13, 2001, and being instructed by the trial court to be specific, attributed one wrongful act to them. Attorney Ducote's conduct has been and remains extremely abusive, and Rule 11 sanctions were appropriately granted.

REASONS FOR DENYING THE PETITION

Rule 11 provides several alternative grounds for the imposition of sanctions. If "subdivision (b) has been violated" in any respect, the District Court, at its discretion, may "impose an appropriate sanction upon the attorneys . . . responsible for the violation." Fed. R. Civ. P. 11(c). Attorney Ducote violated subsections (b)(1), (2) and (3) as correctly

found by the District Court and affirmed by the Eleventh Circuit. Attorney Ducote's Petition does not address these other valid grounds for the imposition of Rule 11 sanctions: improper purpose, harassment, needless increase in the cost of litigation, and the absence of factual and evidentiary support. Fed. R. Civ. P.(b)(1), (3). His Petition only addresses his dissatisfaction with malicious prosecution law. Fed. R. Civ. P. 11(b)(2). Therefore, the Petition is inadequate and should be denied.

RULE 11 SANCTIONS WERE CORRECTLY IMPOSED FOR ATTORNEY DUCOTE'S HARASSMENT AND IMPROPER PURPOSES

Attorney Ducote and Mrs. Titelman pursued the malicious prosecution case to harass the Respondents. This is demonstrated by Attorney Ducote's continued reference here to documents and information which clearly had no relationship to the malicious prosecution action. The District Court struck the "jury letter," but Ducote continues to reference it. His reliance on the inflammatory allegation Mr. Titelman sexually molested his children was deemed irrelevant to the malicious prosecution action. Attorney Ducote continues to make the allegation.

The District Court cited to the letter from Attorney Ducote to the Members the Cobb County Bar and Metro Atlanta Health Professionals wherein he states that "we are taking it to the peers of those who are guilty, and we are charging those people to hold Diane Woods and Elizabeth King accountable. We will continue to fight in both State and Federal Court." [27-A] It was clear to the District Court Attorney Ducote was using the Federal forum in an improper manner by waging a "public relations campaign to discredit

her (Mrs. Titelman's) divorce and custody proceedings . . ." [28-A] Such improper use of the Federal forum gave rise to Rule 11 sanctions supported by *Aetna Ins. Co. v. Meeker*, 953 F.2d 328, 1334 (11th Cir. 1992) and *Pelleteir v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991). [23-28-A]

Attorney Ducote does not address any of these other clearly supported reasons (harassment and improper purpose) for the imposition of Rule 11 sanctions in his Petition. This failure alone warrants the denial of Ducote's Petition for Certiorari.

RULE 11 SANCTIONS WERE CORRECTLY IMPOSED FOR ATTORNEY DUCOTE'S FRIVOLOUS MODIFICATION ARGUMENT

Attorney Ducote's Petition focuses solely on the Georgia law of malicious prosecution in his attempt to justify the filing of the original and amended complaints against Respondents. His attempt to modify Georgia law was frivolous and unsupported and not the motivation for the Complaints. O.C.G.A. § 51-7-40 provides as follows: "A criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action." In *Monroe v. Sigler*, 256 Ga. 759, 762, 353 S.E.2d 23 (1987), the Georgia Supreme Court granted certiorari to consider whether a judicial determination of probable cause made in the course of a criminal prosecution supports probable cause in a civil action for malicious prosecution. In *Monroe*, the defendant related events to the magistrate who issued an arrest warrant. *Id.* The plaintiff's counsel moved for directed verdict of acquittal at the close of her criminal trial. *Id.* Having heard all of the evidence, the trial court denied the

motion, finding the evidence sufficient to authorize a jury to determine guilt beyond a reasonable doubt. *Id.* On appeal the trial court's denial of the motion for directed verdict was found to constitute a binding determination of probable cause in the civil case:

> When the trial judge, having heard all of the State's evidence, considers a motion on behalf of the accused (the accused being present and given an opportunity to be heard in support of the motion); and when the trial judge rules that the evidence is sufficient as a matter of law to support a conviction (that is, it is sufficient to enable a rational trier of fact to find each and every element of the guilt of the accused beyond a reasonable doubt), we can see no reason why such a holding – unreversed and in the absence of fraud or corruption – should not suffice as to the existence of probable cause.

Monroe, 256 Ga. App. 761. *See also Bi-Lo, Inc. v. McConnell*, 199 Ga. App. 154, 404 S.E.2d 327 (1991) (the defendant in a malicious prosecution action is entitled to a judgment as a matter of law where the plaintiff was shown to have moved unsuccessfully for a directed verdict of acquittal in the underlying criminal proceeding). Where the facts are not in dispute in establishing probable cause, the question is for the Court to determine and not a jury. *Booker v. Eddins*, 183 Ga. App. 449, 359 S.E.2d 211 (1987), *overruled on other grounds, Cincinnati Insurance Company v. Premier Tractor and Trailer Repair, Inc.*, 192 Ga. App. 243, 384 S.E.2d 449 (1989).

> Probable cause in this regard may be defined as the existence of such facts and circumstances in